No. 93-144

In the Supreme Court of the United States

OCTOBER TERM, 1993

DEPARTMENT OF REVENUE OF MONTANA, PETITIONER

v.

KURTH RANCH, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether requiring respondents, who had been convicted of possession of marijuana and/or conspiracy to possess marijuana in a separate proceeding, to pay Montana's Dangerous Drug Tax on the marijuana they possessed would violate the Double Jeopardy Clause.

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INTEREST OF THE UNITED STATES

This case raises the question of whether and in what circumstances the imposition of a tax may be barred because the taxpayer has previously been convicted of a criminal offense. The United States is responsible both for prosecuting federal criminal offenses and for collecting federal taxes. The United States therefore has a substantial interest in the question of whether and under what circumstances a criminal prosecution may foreclose the ability of a jurisdiction to collect taxes.

STATEMENT

1. The Kurth family operated a mixed grain and livestock farm in Choteau County, Montana. The family consisted of Richard M. Kurth, his wife, Judith M. Kurth, their son and his wife, Douglas M. Kurth and Rhonda I. Kurth, and their daughter and her husband, Cindy K. Halley and Clayton H. Halley (the Kurth respondents). In late 1985 and early 1986 they began to grow and sell marijuana to supplement their income. On October 18, 1987, state and federal law enforcement personnel raided the farm and seized over 2,000 marijuana plants in various stages of growth; eight pounds of marijuana buds, apparently ready for sale; approximately 100 pounds of marijuana "shake," consisting of the parts of a marijuana plant other than its buds; and a number of other items. Pet. App. 28-30.

The Kurth respondents were charged in state court with criminal offenses relating to the possession and sale of dangerous drugs. On July 18, 1988, Richard M. Kurth pleaded guilty to sale of marijuana, in violation of Mont. Code Ann. § 45-9-101[1]; possession of marijuana, in violation of Mont. Code Ann. § 45-9-103; solicitation of the commission of criminal possession of marijuana, in violation of Mont. Code Ann. § 45-4-101; and criminal possession of hashish, in violation of Mont. Code Ann. § 45-9-102. The other Kurth respondents—Judith M. Kurth, Douglas Kurth, Rhonda Kurth, Clayton Halley, and Cindy Halley—pleaded guilty only to conspiracy to possess marijuana with intent to sell it, in violation of Mont. Code Ann. § 45-4-

[1] All citations to the Montana Code Annotated are to the 1993 edition.

102. Richard Kurth was sentenced to 20 years' imprisonment, with the last 15 years suspended. Judith Kurth was sentenced to five years' imprisonment, with the last four years suspended. Douglas Kurth received a suspended sentence of 20 years' imprisonment. Clayton Halley received a suspended sentence of ten years' imprisonment. The imposition of sentence on Rhonda Kurth and Cindy Halley was deferred for three years. Pet. App. 30-32.

2. Montana's Dangerous Drug Tax Act, Mont. Code Ann. §§ 15-25-101 *et seq.*, provides that "each person possessing or storing dangerous drugs is liable" for a tax based on the value of the drugs. Mont. Code Ann. § 15-25-111. In the case of marijuana, the tax is computed at 10% of the assessed market value of the drugs or $100 per ounce, whichever is greater. Mont. Code Ann. § 15-25-111(2)(a) and (b). The Act took effect 17 days before the raid on the Kurths' farm.

On December 8, 1987, the State assessed a tax on the Kurth respondents pursuant to the Dangerous Drug Tax Act. The tax was initially assessed at $491,776.20, including a 10% penalty and 1% interest, but revised assessments in greater amounts were subsequently issued. Pet. App. 33-34.

3. On September 8, 1988, the Kurth respondents, along with the Kurth Ranch and the Kurth Halley Cattle Company, two entities that they controlled, filed a voluntary petition in bankruptcy under Chapter 11 of the Bankruptcy Code. The State filed a proof of claim of its tax assessment with the bankruptcy court, which was challenged by the debtors and the trustee in bankruptcy. Pet. App. 5. The bankruptcy court disallowed much of the State's claim, on the

ground that the assessment of the amount of the tax was arbitrary. *Id.* at 39-49. But the court held that the tax was properly computed as to the marijuana buds that were packaged for sale and as to the marijuana "shake." The court found that the value of the buds was $2,000 per pound, and that the value of the "shake" was $200 wholesale and $250 to $500 retail per pound. Accordingly, the tax was computed on both items at the minimum $100 per ounce ($1,600 per pound) rate. *Id.* at 49-51. The tax on the two items totaled $208,150, without interest. *Id.* at 58.

The bankruptcy court held, however, that, because the Kurth respondents had previously been convicted in criminal proceedings, imposition of the tax in a subsequent proceeding would violate the Double Jeopardy Clause. In the bankruptcy court's view, that result was required by this Court's decision in *United States* v. *Halper*, 490 U.S. 435 (1989), which held that imposition of a civil penalty on a litigant after a criminal prosecution could violate the Double Jeopardy Clause. Pet. App. 53-59. The district court affirmed the bankruptcy court's ruling. *Id.* at 13-22.

4. The court of appeals affirmed. Pet. App. 1-12. According to the court, *Halper* established that "the double jeopardy analysis requires the trial court to determine whether there is a rational relationship between the sanction imposed and the damages suffered by the government." *Id.* at 8. The court reasoned that "[i]f the additional civil sanction appears sufficiently disproportionate to the remedial goals claimed by [the State], the Kurths are entitled to an accounting in order to determine if the sanction constitutes an impermissible additional punishment." *Id.* at 10. In this case, however, the State had "refused to make any showing regarding the costs incurred in eradicating dangerous drugs and their effects." *Id.* at 10. The court held "that allowing the state to impose this tax, without any showing of some rough approximation of its actual damages and costs, would be sanctioning a penalty which *Halper* prohibits." *Id.* at 11. In the court's view, "[b]y refusing to offer any evidence justifying its imposition of the tax, the State * * * failed to meet the threshold requirements under *Halper*." *Ibid.*

SUMMARY OF ARGUMENT

In *United States* v. *Halper*, 490 U.S. 435, 449 (1989), this Court held that imposition of a civil penalty may be regarded as a second "punishment" for purposes of the Double Jeopardy Clause "to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution." In *Austin* v. *United States*, 113 S. Ct. 2801 (1993), the Court applied a similar analysis to hold that a civil forfeiture may be regarded as a punishment for purposes of the Eighth Amendment's Excessive Fines Clause. In both cases, the question whether the measure should be regarded as imposing a punishment turned on whether it could be explained by reference to compensatory purposes. That inquiry was necessary because civil penalties and civil forfeitures are based on dual penal/non-penal purposes, and in both cases the non-penal purpose is a remedial or compensatory one. Accordingly, if a civil penalty or forfeiture cannot be explained on the basis of its remedial or compensatory purpose, it is reasonable to conclude that it must be based on a penal purpose—*i.e.*, it must be regarded as imposing a punishment.

Deciding whether a tax is a punishment, however, requires recognition that taxes—unlike civil penalties or forfeitures—are not ordinarily based on compensatory or remedial purposes. Rather, taxes typically serve to raise revenue for the government, and they ordinarily are not tied to any particular benefit received by the taxpayer nor to any specific cost that the taxpayer's activities impose on the government. The court of appeals therefore erred in concluding that the absence of a proven remedial purpose in the case of the Montana Dangerous Drug Tax required a holding that the tax should be regarded as a punishment. Under the appropriate analysis, a tax would not be regarded as imposing a punishment if it could be explained on the basis of a revenue-raising (taxing) purpose.

The fact that taxes may have dual purposes—both raising revenue and regulating conduct—does not alter that conclusion. Even if the regulatory purposes often served by taxes were treated like the deterrent or retributive purposes that are characteristic of penal measures—and we doubt that the essentially criminal concept of deterrence can be stretched that far—the fact remains that the *Halper*/*Austin* analysis does not depend on whether a given measure may serve both penal and non-penal purposes. If a measure has dual penal and non-penal purposes, *Halper* and *Austin* establish that it will ordinarily not be regarded as imposing a punishment. Only if the measure extends *beyond* its non-penal purpose is it presumed that it is based at least in part on a penal purpose and must thus be regarded as imposing a punishment. Thus, if a tax measure can be explained on the basis of its non-penal purpose of

raising revenue, it should be regarded as a genuine tax for double jeopardy purposes, and not as a penal measure.

That is not to say that any measure that carries the label of "tax" could not possibly be regarded as imposing a punishment under the Double Jeopardy Clause. Two key principles are useful in determining whether a tax is based on a revenue-raising purpose. Application of these principles will resolve the issue in this and most other cases.

First, where the tax is a tax of general applicability that is imposed on both legal and illegal goods or activities, there is ordinarily no reason for any further inquiry into whether it is a punishment. The fact that the burden of the tax falls on both legal and illegal goods or activities generally ensures that the tax serves the normal revenue-raising purposes of taxation, and that the tax is therefore not a penal measure in disguise. It would be anomalous to permit a defendant to claim a previous criminal prosecution as an exemption from liability for income or other generally applicable taxes.

Second, where the incidence of the challenged tax is solely on illegal goods or activities—as is true in this case—the analysis should turn on whether the tax is of a type, and in an amount, that is ordinarily also imposed on legal goods and activities. For if similar taxes are imposed on legal goods and activities, there is no basis for concluding that the legislature has departed from the ordinary revenue-raising purposes that underlie tax statutes in taxing the illegal goods or activities. In this case, because "sin" taxes are commonly imposed on goods like those at issue in this case, and because the tax at issue here is a value-

based tax that is in an amount that is well within the ordinary range of such taxes, there is no basis for concluding that the tax is a punishment in disguise.

ARGUMENT

MONTANA'S DANGEROUS DRUG TAX DOES NOT IMPOSE A "PUNISHMENT" ON THE TAXPAYER, AND THE DOUBLE JEOPARDY CLAUSE THEREFORE DOES NOT BAR IMPOSITION OF THE TAX IN THIS CASE

A. THE COURT OF APPEALS ERRED IN ASSESSING THE VALIDITY OF MONTANA'S DANGEROUS DRUG TAX IN TERMS OF WHETHER IT SERVED A COMPENSATORY PURPOSE

In two recent cases, this Court has held that civil proceedings can be characterized as imposing "punishment" if they cannot be explained as serving a compensatory, remedial purpose. The court of appeals in this case erred in transposing the analysis employed in those two cases to the very different context here. Since taxes do not ordinarily serve a compensatory purpose, the fact that Montana's Dangerous Drug Tax may not serve such a purpose does not establish that it must be viewed as imposing a punishment under the Double Jeopardy Clause. Indeed, if the court of appeals' conclusion were correct, a taxpayer who had been convicted of income tax evasion could claim immunity from a later civil proceeding to collect the taxes owed; the defendant could reasonably claim that the income tax serves no compensatory purpose and could characterize the tax, like the criminal prosecution, as a penalty for receiving income without paying the tax.

1. In *United States* v. *Halper*, 490 U.S. 435, 436 (1989), this Court considered "whether and under what circumstances a civil penalty may constitute 'punishment' for the purposes of double jeopardy analysis." The defendant in *Halper* had submitted 65 false Medicaid claims to the government that resulted in an overpayment to him of $585. He was first convicted of violating the criminal false claims statute, 18 U.S.C. 287, and was then sued for civil penalties under the False Claims Act, 31 U.S.C. 3729-3731. The district court held that imposing the statutory penalty of $2,000 per violation—or a total of more than $130,000—would violate the Double Jeopardy Clause.

This Court agreed with the district court in *Halper* that a civil penalty under the False Claims Act could constitute a forbidden multiple punishment where the defendant had previously been prosecuted criminally for the same offense. The Court held that "under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution." 490 U.S. at 448-449.

The analysis in *Halper* turned on the extent to which the civil penalty could be explained as compensating the government for a loss. The Court held that, to be classified as punishment, a civil penalty must "be so extreme and so divorced from the Government's damages and expenses as to constitute punishment," 490 U.S. at 442; it must "bear[] no rational relation to the goal of compensating the

Government for its loss," *id.* at 449.[2] Although "the process of affixing a sanction that compensates the Government for all its costs inevitably involves an element of rough justice," *ibid.*, "even an approximation will go far towards ensuring both that the Government is fully compensated for the costs of corruption and that, as required by the Double Jeopardy Clause, the defendant is protected from a sanction so disproportionate to the damages caused that it constitutes a second punishment." *Id.* at 450.

2. The Court adopted a similar approach in analyzing the dual penal/non-penal purposes underlying a civil forfeiture in its recent decision in *Austin* v. *United States*, 113 S. Ct. 2801 (1993). The question presented in *Austin* was whether a civil forfeiture imposes a "punishment" that is subject to the Eighth Amendment's proscription of excessive fines. Relying on *Halper*, see 113 S. Ct. at 2806, 2812, the Court explained that forfeitures, like the civil penalty in *Halper*, could serve both remedial and penal purposes. Thus, resolution of the case depended on whether the civil forfeiture "can only be explained as serving in part to punish." 113 S. Ct. at 2806. The Court analyzed "the historical understanding of forfeiture as punishment," as well as the intended penal purposes of the specific forfeiture statute at issue. *Id.* at 2812. As in *Halper*, the Court concluded that, since the civil forfeiture could not be explained as serving a remedial purpose, the only conclusion left was that it

[2] See also 490 U.S. at 446 (whether the "supposedly remedial sanction * * * remotely approximate[s] the Government's damages and actual costs"); *id.* at 451 (civil penalty must be "rationally related to the goal of making the Government whole").

must serve deterrent and/or retributive purposes—*i.e.*, it must be viewed as "punishment" under the Excessive Fines Clause.

3. The court of appeals in this case purported to employ the *Halper/Austin* inquiry into whether the measure being challenged can be explained as serving only compensatory or remedial purposes. Thus, the court of appeals noted that Montana had "refused to make any showing regarding the costs incurred in eradicating dangerous drugs and their effects." Pet. App. 10.[3] For the court of appeals, that was dispositive: The court's conclusion that the tax imposed a punishment was based entirely on its holding "that allowing the state to impose this tax, without any showing of rough approximation of its actual damages and costs, would be sanctioning a penalty which *Halper* prohibits." *Id.* at 11. In short, the court believed that, because the Montana Dangerous Drug Tax had not been shown to serve a compensatory purpose, it must constitute punishment for double jeopardy purposes.[4]

[3] The State had asked the court to take judicial notice of the substantial costs imposed by drug use, but the court of appeals refused. Pet. App. 10. In our view, that refusal may well have been wrong; the costs of drug use are well known. See *e.g.*, *Harmelin* v. *Michigan*, 111 S. Ct. 2680, 2705-2706 (1991) (Kennedy, J., concurring in part and concurring in the judgment); *United States* v. *A Parcel of Land with a Building Located Thereon*, 884 F.2d 41, 44 (1st Cir. 1989). Accordingly, those costs may well have been a proper subject for judicial notice. Since, as we argue below, there generally is no reason to inquire whether a tax serves a compensatory purpose, the court's ruling on this point is not in our view significant.

[4] It should be noted that, aside from Richard Kurth, each of the other Kurth respondents were prosecuted criminally in

4. The court of appeals erred in relying on the absence of a proven compensatory purpose to find that the Montana tax must be regarded as imposing a punishment. Although civil penalties and forfeitures commonly serve a compensatory or remedial purpose at least in part, taxes do not. Taxation is "a way of apportioning the cost of government among those who in some measure are privileged to enjoy its benefits and must bear its burdens." *Welch* v. *Henry*, 305 U.S. 134, 146 (1938); accord, *United States* v. *Mississippi Tax Comm'n*, 421 U.S. 599, 606 (1975). Aside from the

state court for conspiracy to possess marijuana; only Richard Kurth was prosecuted for the substantive offense of possession of marijuana. This Court has recently reaffirmed the principle that conspiracy to commit a substantive offense is not "the same offense" for double jeopardy purposes as the substantive offense itself. *See United States* v. *Felix*, 112 S. Ct. 1377, 1384-1385 (1992). That is because, under the "elements" test of *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932), each offense requires proof of an element not required by the other: the conspiracy charge requires proof of an agreement, while the substantive charge requires proof of the completed offense. This Court has only recently reaffirmed the applicability of the *Blockburger* test. See *United States* v. *Dixon*, 113 S. Ct. 2849, 2859-2864 (1993). We know of no reason to relax the "elements" test where the second proceeding is civil, rather than criminal, and where only the protection against multiple punishment, and not the protection against a successive criminal prosecution, is involved. Compare *Missouri* v. *Hunter*, 459 U.S. 359, 368-369 (1983).

We recognize that this argument was not presented to the court of appeals. But the fact that the tax imposed on five of the six taxpayers in this case was based on possession of marijuana, an offense that is not the same as that for which they were previously prosecuted, appears from the facts recited by the courts below, see Pet. App. 30-32, and cannot seriously be disputed.

narrow category of users' fees, see, *e.g.*, *Evansville-Vanderburgh Airport Authority Dist.* v. *Delta Airlines, Inc.*, 405 U.S. 707 (1972), "[t]axes are what we pay for civilized society." *Compania General de Tabacos de Filipinas* v. *C.I.R.*, 275 U.S. 87, 100 (1927) (Holmes, J., dissenting). They are generally not intended to compensate the government for any particular benefits a taxpayer enjoys or any particular burdens the taxpayer imposes upon the government or the general public. *Illinois Cent. R. Co.* v. *Decatur*, 147 U.S. 190, 198 (1893). As this Court has explained, "[n]othing is more familiar in taxation than the imposition of a tax upon a class or upon individuals who enjoy no direct benefit from its expenditure, and who are not responsible for the condition to be remedied." *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 622 (1981) (quoting *Carmichael* v. *Southern Coal & Coke Co.*, 301 U.S. 495, 521 (1937)).[5]

The hallmark of a tax is thus the raising of revenue, irrespective of the benefits enjoyed by a particular taxpayer or the costs that taxpayer may impose on the government. The fact that Montana's Dangerous Drug Tax cannot be explained as serving a compensatory or remedial purpose therefore provides no support for the court of appeals' conclusion that it must be regarded as imposing a punishment.

[5] Compare *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 190 (1989) ("there is no constitutional requirement that the benefits received from a taxing authority by an ordinary commercial taxpayer—or by those living in the community where the taxpayer is located—must equal the amount of its tax obligations").

B. IF A TAX CAN RATIONALLY BE EXPLAINED AS SERVING A REVENUE-RAISING PURPOSE, IT SHOULD NOT BE REGARDED AS IMPOSING "PUNISHMENT"

1. Although the inquiry into compensatory purposes served by a particular measure has no application in tax cases, *Halper* and *Austin* nonetheless provide guidance in addressing the question presented in this case. The principle guiding the decisions in *Halper* and *Austin* was that, if the measure being challenged as imposing a punishment may serve both penal and non-penal purposes, but the non-penal purposes are insufficient to explain its enactment or application, then the measure must be regarded as punishment.[6] In other words, when analyzing a civil measure that has dual penal and non-penal purposes, the analysis turns on whether the non-penal (in *Halper* and *Austin*, compensatory) purposes are insufficient to explain the measure, either in general or

[6] In *Halper*, for example, the Court made clear that a civil penalty would *not* be considered punishment insofar as it bore a rational relationship to a compensatory (*i.e.*, non-penal) purpose, regardless of whether it may also serve other, penal purposes. See, *e.g.*, 490 U.S. at 449 (question was whether "the civil penalty * * * bears no rational relation to the goal of compensating the Government for its loss, but rather appears to qualify as 'punishment' in the plain meaning of the word"); *ibid.* (referring to the difficulty of determining "the precise dollar figure at which a civil sanction has accomplished its remedial purpose of making the Government whole, but beyond which the sanction takes on the quality of punishment"); *id.* at 450 (referring to "the size of the civil sanction the Government may receive without crossing the line between remedy and punishment").

in a particular case. If the non-penal purposes are sufficient, the fact that the measure may serve penal purposes as well is essentially irrelevant.

It is important to recognize that the *Halper/Austin* analysis does not characterize a civil measure as imposing punishment simply because the measure has dual penal and non-penal purposes. Indeed, if the existence of dual purposes were sufficient to require regarding a civil sanction as punishment, no extensive analysis and remand would have been necessary in *Halper*, for it is likely that every civil *penalty* would have to be regarded as punishment. As the Court in *Halper* acknowledged, however, the mere fact that from the defendant's point of view "even remedial sanctions carry the sting of punishment" is insufficient to characterize remedial sanctions that are imposed in a civil proceeding as punishment. 490 U.S. at 447 n.7. Once the determination has been made that a civil measure can be explained in terms of a non-penal purpose, that is the end of the inquiry.

2. When applied in the context of a tax statute, the inquiry into whether the tax must be regarded as imposing a punishment thus turns on whether the tax can be explained as serving the non-penal purpose of raising revenue. If it can, the tax is properly viewed as a genuine tax, not a punishment in disguise. Only if the tax cannot rationally be explained as serving a revenue-raising function—*i.e.*, only if it is not, despite its label, a tax at all—may it be regarded as imposing a punishment for double jeopardy purposes.

The fact that taxes frequently serve a dual function thus does not alter the conclusion that the existence of a revenue-raising purpose—regardless of what

other purposes might be served—is sufficient to establish that a tax should not be regarded as a "punishment." In addition to raising revenue, "[e]very tax is in some measure regulatory," since "it interposes an economic impediment to the activity taxed as compared with others not taxed." *Sonzinsky* v. *United States*, 300 U.S. 506, 513 (1937). But this Court has made clear that "a tax is not any the less a tax because it has a regulatory effect." *Ibid*; accord *United States* v. *Sanchez*, 340 U.S. 42, 44 (1950); *United States* v. *Doremus*, 249 U.S. 86, 93-94 (1919). Indeed, in *Bob Jones University* v. *Simon*, 416 U.S. 725, 741 n.12, 743 (1974), the Court noted that it had abandoned the effort to distinguish between revenue-raising and regulatory taxes on the basis of the primary purpose of the enactment.

For example, in *A. Magnano Co.* v. *Hamilton*, 292 U.S. 40 (1934), the taxpayer complained that a high tax imposed by a State on butter substitutes—but not on butter—was unconstitutional under the Due Process Clause. In discussing the challenge, the Court held that the tax would be found unconstitutional only if the taxing statute is "so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power, but constitutes, in substance and effect, the direct exertion of a different and forbidden power, as, for example, the confiscation of property." *Id.* at 44. A tax is subject to challenge as confiscatory only if "its necessary interpretation and effect be such as plainly to demonstrate that the form of taxation was adopted as a mere disguise." *Id.* at 44-45. See also *Pittsburgh* v. *Alco Parking Corp.*, 417 U.S. 369, 375 (1974) (rejecting claim that tax is a taking and holding that "even if the revenue collected had been

insubstantial, * * * or the revenue purpose only secondary, * * * [the Court] would not necessarily treat this exaction as anything but a tax entitled to the presumption of the validity accorded other taxes imposed by a State"), citing *Sonzinsky* v. *United States*, 300 U.S. 506, 513-514 (1937), and *Hampton & Co.* v. *United States*, 276 U.S. 394, 411-413 (1928).

The regulatory purposes frequently served by taxes are not properly equated with the deterrent purposes that this Court has identified, along with retribution, as underlying penal measures. While legislatures often seek to mold social behavior by imposing varying levels of taxation on distinct activities, the legislature's purpose is not ordinarily to eliminate entirely the disfavored activity (as is the case with criminal prohibitions). Nor is it to cast the kind of social opprobrium on those who engage in the disfavored activity that would follow from the violation of a criminal statute. But even if the regulatory purposes served by some tax measures were equated with the deterrent purposes that this Court held in *Halper* to be a characteristic of "punishment," a tax that serves both revenue-raising and regulatory purposes is valid under that case.

3. It may be objected that the standard we advance to determine whether a tax statute imposes a punishment—*i.e.*, whether the statute can be explained as based on a revenue-raising purpose—would result in toothless judicial review of tax measures that are claimed to impose criminal punishments. But substantial deference to legislative judgments as to the subjects and rates of taxation is an entirely appropriate result of the standard we propose.

Initially, it should not be unexpected that the standard we propose would result in less close judicial scrutiny of tax measures than of the civil penalties or forfeitures that were at issue in *Halper* and *Austin*. *Halper* involved a provision imposing a monetary exaction that was expressly labeled a "civil penalty." Virtually by definition, there was thus a substantial basis in *Halper* for suspecting that the "penalty" at issue imposed a punishment. Yet even in that context, the Court did not find the label dispositive. Instead, it adopted a test that permits dual purpose penal/non-penal civil penalties to be imposed after a criminal prosecution, so long as the non-penal purpose is sufficient to explain the entire amount of the sanction.

In *Austin*, the forfeiture measure under scrutiny was not stamped by the legislature with the express label of "penalty." But the measure did come before the Court with what the Court determined to be a consistent historical record recognizing that civil forfeitures are intended to serve penal purposes. 113 S. Ct. at 2806-2810. And the Court found additional evidence for that proposition in the provisions and legislative history of the particular forfeiture statute that was invoked in *Austin*. See *id.* at 2810-2812.[7] Indeed, the evidence in *Austin* that punishment was intended was sufficiently strong that the Court found

[7] The concurring Justices did not appear to disagree. See 113 S. Ct. at 2813-2814 & n.* (Scalia, J., concurring in part and concurring in the judgment) (agreeing that forfeitures were historically regarded as punitive); *id.* at 2814 (agreeing that the statute suggests penal purposes as well). See also *id.* at 2815 (Kennedy, J., concurring in part and concurring in the judgment).

it possible to decide the case without considering the particular facts of the forfeiture before it, as it had in *Halper*. Cf. 113 S. Ct. at 2812 n.14.

Tax statutes—unlike civil penalty provisions—do not come before a court accompanied by an express label indicating that a penalty was intended. Nor is there ordinarily a historical or statutory background to a tax statute—as in the case of the *Austin* forfeiture provision—that demonstrates that a penal result was intended. To the contrary, this Court has consistently regarded measures that have a revenue-raising purpose as legitimate taxes and has repudiated the contention that the fact that the measures may have a regulatory purpose as well requires them to be regarded as penal. See pp. 16-17, *supra*. Moreover, this Court has repeatedly instructed that "[t]he simple fact is that the appropriate level or rate of taxation is essentially a matter for legislative, and not judicial resolution." *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 627 (1981) (citing cases).[8] It is thus entirely consistent with the historical understanding of taxes and with the legislature's very substantial discretion in imposing taxes to hold that, if the tax is supported by a revenue-raising purpose, it does not constitute a punishment for purposes of the Double Jeopardy Clause.

[8] Accord *Nordlinger* v. *Hahn*, 112 S. Ct. 2326, 2332 (1992); *Allegheny Pittsburgh Coal Co.* v. *County Comm'n*, 488 U.S. 336, 344 (1989); *Regan* v. *Taxation with Representation*, 461 U.S. 540, 547 (1983); *Madden* v. *Kentucky*, 309 U.S. 83, 88 (1940) ("[I]n taxation, even more than in other fields, legislatures possess the greatest freedom in classification.").

C. MONTANA'S DANGEROUS DRUG TAX DOES NOT IMPOSE A PUNISHMENT AND MAY THEREFORE BE VALIDLY APPLIED IN THIS CASE

We acknowledge that it is conceivable that a legislature could attempt to impose a criminal-type penalty under the label of a "tax." A number of factors may be relevant in determining whether a tax challenged as imposing punishment for double jeopardy purposes is in fact a revenue-raising measure or whether instead "the form of taxation was adopted as a mere disguise." *A. Magnano*, 292 U.S. at 44-45. Although we do not purport to offer an exhaustive catalogue of factors, a few principles that can guide the analysis may be sufficient to resolve most cases that arise in this area.

1. Where the challenged tax is one of general applicability, *i.e.*, where it is imposed on both legal and illegal goods or activities, there is no reason for any further inquiry into whether it in fact imposes a punishment.[9] Any other rule would lead to the absurd conclusion that an individual who commits a criminal offense and is successfully prosecuted for it obtains an immunity from taxes that his counterpart who engages in a similar, legal business must pay. See

[9] In order to qualify as a tax of general applicability, the tax need not apply by its own terms in precisely the same manner to a variety of goods or activities. For example, a State may impose slightly different rates of sales and use taxes on different goods that, taken together, form one coherent sales tax scheme. If it fits within such an overall scheme, even a specific sales tax that is levied solely on sale of illegal drugs would be a tax of general applicability, since it would form one component of the State's sales tax scheme.

United States v. *Constantine*, 296 U.S. 287, 293 (1935) ("It would be strange if one carrying on a business the subject of an excise should be able to excuse himself from payment by the plea that in carrying on the business he was violating the law."). There is no basis for providing that kind of perverse financial incentive to those who violate the criminal law, and this Court has consistently rejected the proposition that a criminal prosecution provides a tax immunity to a criminal defendant. See, *e.g.*, *James* v. *United States*, 366 U.S. 213, 221 (1961) (plurality opinion); *Spies* v. *United States*, 317 U.S. 492, 495 (1943).[10]

The above principle is applicable even where the failure to pay the tax renders the otherwise legal activity illegal. Perhaps the clearest example would be the federal income tax. Under federal law, a tax is imposed on income, "from whatever source derived," 26 U.S.C. 1, 61(a), and willful failure to pay the tax is a serious criminal offense, 26 U.S.C. 7201. It obviously would not avail an individual who has been convicted of tax evasion to set up his criminal conviction as a bar to collection of the tax he owes. To be sure, the criminal defendant/taxpayer could argue that the income tax was being imposed on the same, illegal activity for which he was criminally prosecuted—*i.e.*, receiving income without paying the tax on it. But

[10] See also *Iannielli* v. *Commissioner*, 98 T.C. 165, 179 (1992) ("A taxpayer sentenced to imprisonment and fined after conviction in a criminal tax matter is punished for the commission of a crime, and is not thereby relieved of his obligation to pay taxes due"); *Lockman* v. *Commissioner*, 58 T.C.M. (CCH) 542, 544 (1989) ("It is well settled that [the Commissioner] is not barred from collecting deficiencies and associated civil sanctions from the taxpayers who have pled guilty to a criminal charge). Cf. *Helvering* v. *Mitchell*, 303 U.S. 391, 399 (1938).

that argument could not prevail; a criminal conviction does not provide a general immunity from civil obligations.[11]

2. The tax in this case is not one of general applicability in the above sense. The analysis therefore should ask whether the tax is of a type, and in an amount, that is in accord with taxes ordinarily imposed on legal goods and activities. For if similar taxes are imposed on legal goods and activities, there is no basis for concluding that the legislature has departed from the ordinary revenue-raising purposes that underlie tax statutes in taxing the illegal goods or activities. The fact that the goods or activities subject to the tax are illegal—and that the individual on whom the tax is imposed has previously been convicted of a crime—surely should not give that individual immunity from an otherwise lawful tax. Cf. *Marchetti* v. *United States*, 390 U.S. 39, 44 (1968) ("The Court has repeatedly indicated that the unlawfulness of an activity does not prevent its taxation.").

Because the tax at issue here is a value- and quantity-based tax that is in an amount that is well within the general range of such taxes, there is no basis for concluding that the tax is in fact a punishment in disguise. "Sin" taxes are commonly imposed on goods like those at issue in this case. Like many

[11] Another example is provided by the National Firearms Act, 26 U.S.C. 5801 *et seq.* That statute, *inter alia*, imposes a tax and registration requirement on the transfer of certain defined firearms. 26 U.S.C. 5812. The statute also makes it a criminal offense to possess an untaxed and unregistered firearm. 26 U.S.C. 5861(d), 5871. As in the case of income taxes, an individual who is convicted and punished for possession of an unregistered firearm may not set up his conviction as a defense to payment of the tax.

sin taxes, the tax in this case is based on the value of the item taxed. For example, the federal tax on most cigars is set at approximately the same rate as the 10% tax on marijuana imposed by the Montana Dangerous Drug Tax. See 26 U.S.C. 5701(a)(2) (Supp. IV 1992) (tax rate of 10.625% to 12.75% of the sales price, subject to maximum dollar limit). Although Montana supplements the percentage tax with a minimum tax on marijuana of $100 per ounce that is based on quantity, not value, that method is also commonly used in sin taxes. See 26 U.S.C. 5701(b) (Supp. IV 1992) (tax on cigarettes calculated per cigarette); 26 U.S.C. 5001 (Supp. IV 1992) (tax on distilled spirits calculated on the basis of alcoholic strength and quantity).

Nor could it be argued that the amount of the tax in this case is so high as to be punitive. With respect to the marijuana "buds" prepared for sale by the Kurths, the bankruptcy court found that their market value was approximately $2,000 per pound, and that, because of the $100 per ounce minimum, the tax was imposed at $1,600 per pound, or 80% of market value. Pet. App. 50-51. That amount bears a rational relationship to the value of the item being taxed, compare *Halper*, 490 U.S. at 449, 451, is not set at a dramatically higher level than similar taxes imposed on comparable products, and may well be accounted for by special features attendant on the illegal nature of the marijuana business. Cf. *United States* v. *Constantine*, 296 U.S. at 297-298 (Cardozo, J., dissenting). For example, although the federal tax on cigarettes is currently only 24 cents per pack, 26 U.S.C. 5701(b) (Supp. IV 1992), President Clinton's recently proposed health care plan would increase that amount to

99 cents per pack. See 139 Cong. Rec. E2687 (daily ed. Oct. 28, 1993). If that tax were enacted, the total tax burden on cigarettes in some jurisdictions, including federal, state, and local taxes, could easily surpass the 80% rate that Montana effectively applied in this case.

The same conclusion follows with respect to the marijuana "shake," which the bankruptcy court found to have a value of $200 to $500 per pound, and which, by virtue of the $100 per ounce minimum, was subjected to a $1600 per pound tax. Pet. App. 50-51. Although the effective rate on "shake" is higher than that on "buds", that appears to be the result of the application of Montana's minimum tax rate on a very low-quality, inexpensive product. Any tax that is imposed at a fixed rate can have such an impact on a very inexpensive, low-quality product. See, *e.g.*, 26 U.S.C. 4064 (Supp. IV 1992) (tax of $7,700 per automobile on automobiles with fuel economy of less than 12.5 miles per gallon); 26 U.S.C. 4131(c)(2), as reinstated by the Revenue Reconciliation Act of 1993, Pub. L. No. 103-66, § 13421(c)(1), 107 Stat. 566 (fixed tax on vaccines, ranging from 6 cents to $4.56 per dose); 26 U.S.C. 4681 (Supp. IV 1992) (fixed tax on ozone-depleting chemicals). So long as the tax bears a rational relationship to the ordinary value of the product, the fact that a fixed tax rate has a disproportionate impact on a low-quality product does not convert it into a punishment for those on whom the disproportionate impact falls.

Finally, the statutory language and legislative history support the conclusion that Montana's Dangerous Drug Tax is a revenue-raising measure. Cf. *United States* v. *Ward*, 448 U.S. 242, 248-249 (1980). The statute is codified as part of Montana's tax code, the tax is collected by the Montana Department of

Revenue, and much of the machinery by which Montana ordinarily collects taxes is applicable to the Dangerous Drug Tax. See Mont. Code Ann. § 15-25-113. The preamble to the statute recites that there exists in Montana "a large and profitable dangerous drug industry" and an "expensive trade in dangerous drugs," that the drug industry has an "economic impact upon the state," and that "it is appropriate in view of the economic impact of such drugs to tax those who profit from drug-related offenses." See *Sorenson* v. *State Dep't of Revenue*, 836 P.2d 29, 31 (Mont. 1992). Funds collected from the tax are earmarked for youth evaluations, chemical abuse assessment and aftercare, and juvenile detention facilities. Mont. Code Ann. § 15-25-122. All of those indications support the conclusion that, whatever other purposes it may serve, the Dangerous Drug Tax can be explained as a revenue-raising measure. Accordingly, it is not a "punishment" that is subject to the proscriptions of the Double Jeopardy Clause.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted.

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NOVEMBER 1993